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Public Prosecutor v Agus bin Agil

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–23 OF 2005
JAMES FOONG, HASAN LAH AND SULONG MATJERAIE JJCA
27 APRIL 2009

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — 341.1g of methamphetamine — Large amount of drugs found concealed on accused person at airport — Whether drugs meant for personal consumption — Whether intention to traffic in dangerous drugs established — Whether large quantity of drugs found indicated intention to traffic

The respondent, an Indonesian who came to Malaysia for a short visit, was returning to Indonesia. Whilst at the Subang International Airport, a body search was carried out on the respondent by PW4 who suspected that something was hidden on both part of the thigh underneath the pants worn by the respondent. On PW4's instruction, the respondent took out from underneath his pants two black plastic packages containing 298.3g of methamphetamine (the subject matter of another charge). PW4 then handed over the respondent to SP6 who rearrested the respondent. The respondent was then taken to the Damansara Police Station where another body search on him revealed two more black plastic packages which dropped from the underpants. These two packages contained 341.1g of methamphetamine (the subject matter of the present charge). The responden was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The learned trial judge held that the prosecution failed to prove a prima facie case of trafficking against the respondent on the grounds that since the respondent was already arrested and detained, he no longer had the necessary intention to traffic. The learned trial judge, however, found that the drug was in the possession of the respondent. He accordingly amended the charge to an offence under s 12(2) of the Act. The responded pleaded guilty to the amended charge. The public prosecutor appealed against the decision. The only issue arising in the appeal was whether the respondent was trafficking in the said drugs. At the date of the commission of the offence methamphetamine was not included in s 37(da) of the Act which provides for presumption of trafficking in certain drugs. As such the prosecution could not use the presumption of trafficking in s 37(da) of the Act to prove its case against the respondent. Section 37 now however allows the invocation of the presumption of trafficking against anyone found in possession of 50g or more of methamphetamine.

Held, allowing the appeal:

(1) As a matter of common sense the larger the quantity of drugs involved the

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stronger the inference that they are not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it (see para 16).

(2) No evidence was adduced by the prosecution to show the value of the said drugs or how many people could consume that quantity of methamphetamine so as to show that the quantity of the drugs found in the respondent's possession was large. However, when s 37(da) was amended later by the Dangerous Drugs (Amendment) Act 1998 (Act A1025) and came into force from 15 September 1998, which was four months after the commission of the offence, a presumption of trafficking was included in respect of 50g or more in weight of methamphetamine. As such, an inference that could be drawn was that the 341.1g of methamphetamine found in possession of the respondent was large in quantity and so it was not intended for the respondent personal consumption. The weight of the drug involved was more than six times of the minimum weight of 50g and it was therefore far in excess of what he would normally require for his personal use, if any (see para 20).

(3) The learned judge erred in his finding that the respondent did not have the necessary intention to traffic the said drugs because when the said drugs was recovered from him he was already under arrest and being detained in the police lock up. This was not a case whereby the drugs were obtained by the respondent while he was in the police lock up. The said drugs were already in his possession while he was at the airport waiting to board a plane to go back to Indonesia. Thus the respondent had the intention to traffic the said drug from the beginning (see para 21).

[Bahasa Malaysia summary

Responden, seorang warganegara Indonesia yang datang ke Malaysia untuk lawatan singkat, sedang dalam perjalanan pulang ke Indonesia. Semasa di Lapangan Terbang Antarabangsa Subang, satu pemeriksaan badan dilakukan ke atas responden oleh PW4 yang mengesyaki bahawa ada sesuatu tersorok di kedua-dua bahagian paha di bawah seluar yang dipakai oleh responden. Atas arahan PW4, responden mengeluarkan dari bawah seluarnya dua bungkusan plastik hitam mengandungi 298.3g methamphetamine (subjek perkara satu lagi pertuduhan). PW4 kemudian menyerahkan responden kepada SP6 yang menangkap semula responden. Responden kemudian dibawa ke Balai Polis Damansara di mana satu lagi pemeriksaan badan ke atasnya mendedahkan dua lagi bungkusan plastik hitam yang jatuh dari seluar dalamnya. Kedua-dua bungkusan ini mengandungi 341.1g methamphetamine (subjek perkara pertuduhan ini). Responden kemudian dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Hakim bicara yang bijaksana memutuskan bahawa pihak pendakwaan gagal membuktikan kes prima facie pengedaran terhadap responden atas alasan bahawa oleh sebab responden telah

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pun ditangkap dan ditahan, dia tidak lagi mempunyai niat untuk mengedar. Hakim bicara yang bijaksana, walau bagaimanapun, mendapati bahawa dadah tersebut dalam milikan responden. Dia dengan itu meminda pertuduhan kepada kesalahan di bawah s 12(2) Akta tersebut. Responden mengaku salah terhadap pertuduhan terpinda. Pihak pendakwaan merayu terhadap keputusan tersebut. Satu-satunya isu yang timbul di dalam rayuan tersebut adalah sama ada responden mengedar dadah tersebut. Pada tarikh kesalahan dilakukan methamphetamine tidak termasuk di dalam s 37(da) Akta tersebut yang memperuntukkan anggapan pengedaran dadah tertentu. Oleh itu pihak pendakwaan tidak boleh menggunakan anggapan pengedaran dalam s 37(da) Akta tersebut untuk membuktikan kesnya terhadap responden. Walau bagaimanapun, s 37 kini membenarkan penggunaan anggapan mengedar terhadap sesiapa yang didapati memiliki 50g atau lebih methamphetamine.

Diputuskan, membenarkan rayuan:

(1) Adalah sesuatu yang diketahui umum bahawa lebih besar kuantiti dadah yang terlibat inferens adalah lebih kukuh bahawa ia bukan diniatkan untuk penggunaan sendiri oleh orang yang membawanya, dan keterangan yang lebih meyakinkan diperlukan untuk mematahkannya (lihat perenggan 16).

(2) Tidak ada keterangan yang dikemukakan oleh pihak pendakwaan untuk menunjukkan bahawa nilai dadah yang dikatakan atau berapa orang boleh menggunakan kuantiti methamphetamine tersebut untuk menunjukkan bahawa kuantiti dadah yang didapati di dalam milikan responden adalah besar. Walau bagaimanapun, apabila s 37(da) dipinda kemudian oleh Akta Dadah Berbahaya (Pindaan) 1998 (Akta A1025) dan berkuatkuasa dari 15 September 1998, yang merupakan empat bulan selepas perlakuan kesalahan tersebut, anggapan pengedaran telah dimasukkan berkaitan dengan 50g atau lebih berat methamphetamine. Oleh demikian satu inferens yang boleh dibangkitkan adalah bahawa 341.1g methamphetamine yang didapati dalam milikan responden adalah tinggi dalam kuantiti dan ia bukan diniatkan untuk penggunaan peribadi responden. Berat dadah yang terlibat adalah enam kali lebih daripada berat minimum 50g dan ia adalah oleh itu jauh lebih tinggi daripada apa yang dia akan biasanya perlukan untuk penggunaan peribadinya, jika ada (lihat perenggan 20).

(3) Hakim bicara yang bijaksana terkhilaf di dalam penemuannya bahawa responden tidak mempunyai niat yang diperlukan untuk mengedar dadah tersebut kerana apabila dadah tersebut ditemui daripadanya dia telahpun ditangkap dan sedang ditahan di lokap polis. Ini bukanlah kes di mana dadah diperoleh oleh responden semasa dia di dalam lokap polis. Dadah tersebut telah berada dalam milikannya semasa dia di lapangan terbang menunggu untuk menaiki kapal terbang untuk balik ke

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Indonesia. Oleh demikian responden mempunyai niat untuk mengedar dadah tersebut dari awalnya (lihat perenggan 21).]

Notes:

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Cases referred to

Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64, PC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Karim bin AB Jabar [2008] 3 MLJ 685, CA (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), (3), 37(da), 39B(1)(a)

Appeal from: Criminal Trial Nos 47–9 of 2000 and 47–7 of 2000 (High Court, Shah Alam)

Nurulhuda Nuraini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
T Vijayandran (T Vijay & Co) for the respondent.

Hasan Lah JCA:

[1] This is an appeal by the public prosecutor against the decision of the learned trial judge in the High Court at Shah Alam amending the original charge of trafficking in 341.1g of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') against the respondent (the accused in the High Court) to one of possession punishable under s 12(3) of the same Act. The respondent pleaded guilty to the amended charge and was sentenced to 4½ years with effect from the date of his conviction ie 9 December 2005.

[2] We heard this appeal on 13 December 2008 and unanimously allowed it. We now give the grounds of our decision.

[3] The facts of the case as found by the learned trial judge are as follows. The respondent is an Indonesian who came to Malaysia for a short visit on 14 May 1998. He wanted to go back to Indonesia on 16 May 1998. At the Subang International Airport at about 6.20pm. PW4 (Kpl Joseph Bartram ak Brain), a security assistant on duty at Gate 6, Terminal 1 of the Subang Airport, conducted a body search on the respondent. PW4 suspected that something was hidden on both part of the thigh underneath the pants worn by the

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respondent. On PW4's instruction, the respondent took out from underneath his pants two black plastic packages containing crystalline substance which was later confirmed by the chemist to contain 298.3g of methamphetamine, the subject matter of another charge.

[4] PW4 proceeded to seize the respondent's international passport, boarding pass and air ticket and escorted him to the airport police station where the respondent was handed over to SP6 (Sjn Jagdev Singh a/l Saran Singh) at about 8.20 pm SP6 then rearrested the respondent. From there, the respondent was then brought to the Damansara Police Station at about 10.45pm by SP7 (L/Kpl Zamrus bin Abd Kudus) and L/Kpl Jelani bin Mohamad Nor.

[5] At the Damansara Police Station the respondent was handed over to Sjn Ahmad bin Othman ('SP8') at about 10.50pm who then sent the respondent to the lock up. PW10 (L/Kpl Che Manan bin Rejab) and PW11 (L/Kpl Akhbar bin Nayan) were on duty at the station's lock up at that time. They received the respondent at about 11.10pm from L/Kpl Jelani bin Mohamad Nor). SP11 carried out body check on the respondent and the respondent was asked to undress. While the respondent was undressing his underpants PW10 saw two black plastic packages dropped from the underpants. PW10 checked the content of the two packages and found that they contained crystalline substance. When PW10 asked the respondent about that the respondent said they were 'Chinese vitamin medicine'. The chemist later confirmed that the crystalline substance contained 341.1g of methamphetamine. It is the subject matter of the charge in this case.

[6] At the close of the case for the prosecution the learned trial judge held that the prosecution failed to prove a prima facie case against the respondent on the basis that since the appellant was already arrested and detained he no longer had the necessary intention to traffic. This is what the learned trial judge said in his judgment:

> Mengenai pertuduhan kedua iaitu bagi dadah yang dijumpai di tempat pemeriksaan di lokap Balai Polis Damansara, saya mendapati bahawa pendakwaan gagal membuktikan kes prima facie pengedaran dadah terhadap tertuduh. Pada penghakiman saya seorang yang telah digari kedua-dua tangannya sejak ia mula ditahan di lapangan terbang dan sentiasa di dalam kawalan dan jagaan polis sehingga dadah tersebut dijumpai semasa pemeriksaan di lokap, tidak mungkin lagi boleh mengedar dadah. Jika sekalipun diandaikan OKT mempunyai niat untuk mengedar dadah sebelum ia ditangkap di lapangan terbang niat tersebut secara logiknya sudah tidak wujud lagi dan dilupakannya apabila ia telah ditangkap, digari dan dikawal sepanjang masa oleh polis. Pendakwaan tidak ada mengemukakan sebarang keterangan bahawa OKT cuba melakukan sesuatu bagi menyembunyikan dadah tersebut, untuk tujuan pengedaran selepas ia ditangkap. Dadah tersebut tidak dijumpai lebih awal semata-mata kerana polis atau SP4 tidak membuat

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A pemeriksaan fizikal secara rapi ke atas OKT selepas ia ditahan. Jika sekalipun diandaikan anggapan pengedaran dadah di bawah s 37(da) ADB terpakai, anggapan tersebut bukanlah satu anggapan yang tidak boleh disangkal. Pada saya, fakta kes ini sendiri sudah mencukupi untuk menyangkal sebarang anggapan pengedaran dadah.

B **[7]** The learned trial judge, however, found that the drug was in the possession of the respondent. He accordingly amended the charge to an offence under 12(2) of the Act. The responded pleaded guilty to the amended charge and he was sentenced to 4½ years of imprisonment.

C **[8]** In the hearing of the appeal before us the respondent did not dispute the learned trial judge's finding that the respondent was in actual possession of the said drugs. In his judgment the learned trial judge held that the respondent had the custody, control and exclusive possession of the two packages containing the said drugs. With regard to the knowledge he said:

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> Dalam kes ini inferens mengenai pengetahuan tertuduh terhadap dadah tersebut dapat dibuat dari perbuatan tertuduh yang sengaja menyembunyikan bungkusan tersebut di dalam seluarnya. Tindakan ini tidak konsisten dengan kelakuan seseorang yang tidak bersalah. Ia tidak perlu bersusah payah menyembunyikannya
> E jika ia adalah ubat yang tidak menyalahi undang-undang.

We too, after having given careful consideration to the facts of the case, agree with the learned trial judge's finding that the respondent had actual possession of the said drugs in view of the manner in which the respondent carried the
F drugs on his person.

[9] As such, the only issue for determination in this appeal was whether the respondent was trafficking in the said drugs. The learned deputy public prosecutor contended that based on the facts of the case the respondent had the
G intention to traffic in the said drugs prior to his arrest. The respondent was in fact waiting to board the aeroplane to fly back to Indonesia. At that time the said drugs were already in his possession.

[10] It must be noted that at the date of the commission of the offence
H methamphetamine was not included in para (da) of s 37 of the Act which provides for presumption of trafficking in certain drugs. As such the prosecution could not use the presumption of trafficking in s 37(da) of the Act to prove its case against the respondent. The prosecution therefore had to prove by evidence that the respondent was trafficking in the said drugs.

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[11] The learned deputy public prosecutor submitted that what was done by the respondent amounted to the act of trafficking of the said drugs as defined under s 2 of the Act. In support of that the learned deputy public prosecutor cited the case of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

[12] In response to that learned counsel for the respondent submitted that mere act of carrying the said drugs is not sufficient to constitute the offence of trafficking. In support of that he referred to the observation made by Lord Diplock in *Ong Ah Chuan v Public Prosecutor* that:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied.

[13] According to him Augustine Paul J (as he then was) held in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 that the mere act of, say, 'keeping', or 'concealing' or 'carrying' dangerous drugs as enumerated in s 2 of the Act would not constitute 'trafficking' without any further evidence of an intention to trade or deal in them.

[14] It is the respondent's contention that the word 'trafficking' in the Act must be given its ordinary meaning and the legal meaning of 'trafficking' as defined in *Black's Law Dictionary*, (6th Ed) is:

> Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales.

[15] Learned counsel for the respondent further submitted that in the instant case the prosecution did not lead evidence to show that the quantity of the said drugs carried by the respondent was large. There was no evidence to show what was the quantity of the drugs consumed by an average addict or the value of the said drugs.

[16] It is trite law that mere keeping, concealing or carrying of the drugs is not sufficient to constitute trafficking. Lord Diplock in *Ong Ah Chuan*'s case, however, also said at p 69 that:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express

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admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible examination by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it.

[17] In *Public Prosecutor v Karim bin AB Jabar* [2008] 3 MLJ 685, 10.384kg of cannabis was recovered from the car driven by the respondent. Gopal Sri Ram JCA, after referring to the passage above from *Ong Ah Chuan*'s case said at p 690 that:

[8] In the present appeal the respondent was found conveying the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it. Unfortunately, the learned trial judge in the court below did not direct his mind along these lines.

[18] In *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241, the appellant was transporting 133kg of cannabis in a car. The High Court judge convicted him of the offence of trafficking. On appeal, this court, through Gopal Sri Ram JCA said at p 250 that:

Applying the common sense approach laid down by Lord Diplock in *Ong Ah Chuan*, the learned judge's conclusion that the appellant was guilty of trafficking is abundantly justified.

This is how the learned judge put it at p 24 of his judgment:

I find the story and the defence of the accused has not raised any reasonable doubt on the prosecution case that he was in exclusive control and custody of the cannabis in the car at about 4.30pm on 17 January 1997 and that he was aware of the nature of the cannabis in the car — that he was in possession of the cannabis — and that he transported the cannabis in the car from outside Kg Chubadak Dalam to Kg Chubadak Dalam, Sentul Pasar. I find him guilty on the charge save that the date and time of the offence is amended to read as occurring on 17 January 1997 at about 4.30pm. And I convict the accused on the charge.

We find counsel's attack on this finding by the learned judge to be without merit. It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages

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in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save for the purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For that reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

[19] In *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 Ariffin Zakaria FCJ (as he then was) said at pp 206 and 207:

[22] In the present case, the drug was carried in small plastic packets each containing small quantity of the drug. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09g of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57g of heroin was found in the left side pocket of the track top he was wearing, 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. Judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption. In any event, it was never suggested in his defence that it was so. His defence was a mere denial that the drug was ever found on him. This was rejected by the learned trial judge. We are satisfied he was not just a passive carrier. Armed with these facts, we are satisfied that had the learned trial properly directed himself, he would nonetheless have come to the same finding. In the circumstances, we hold that the Court of Appeal ought to have applied the proviso to s 60(1) of the CJA and uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge. For the above reasons, this appeal is allowed and the order of the Court of Appeal is set aside. Accordingly, the conviction and sentence imposed by the High Court are reinstated and affirmed.

[20] It is true as submitted by learned counsel for the respondent that no evidence was adduced by the prosecution to show the value of the said drugs or how many people could consume that quantity of methamphetamine so as to show that the quantity of the drugs found in the respondent's possession was large. However, when s 37(da) was amended later by the Dangerous Drugs (Amendment) Act 1998 (Act A1025) and came into force from 15 September 1998, which was four months after the commission of the offence, a presumption of trafficking was included in respect of 50g or more in weight of methamphetamine. As such we are of the view that an inference that may be drawn is that the 341.1g of methamphetamine found in possession of the respondent was large in quantity and so it was not intended for the respondent personal consumption. It is to be observed that the weight of the drug involved

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was more than six times of the minimum weight of 50g and it was therefore far in excess of what he would normally require for his personal use, if any.

[21] With regard to the learned trial judge's finding that the respondent did not have the necessary intention to traffic the said drugs because when the said drugs was recovered from him he was already under arrest and being detained in the police lock up, with respect, we are of the view that the learned trial judge erred in his finding. It is to be noted that this is not a case whereby the drugs were obtained by the respondent while he was in the police lock up. The facts clearly show that the said drugs were already in his possession while he was at the airport waiting to board a plane to go back to Indonesia. The facts of the case, in our view, show that, the respondent had the intention to traffic the said drug from the beginning. The learned trial judge should have viewed the prosecution evidence in its entirety when considering whether the respondent had the intention to traffic the said drugs. What the learned trial judge did here was to consider only the evidence as to what had happened in the police lock up. The evidence adduced by the prosecution clearly show that there was an intention by the respondent to traffic the said drugs, otherwise why was the need to bring back the drugs to Indonesia in a large quantity.

[22] For the reasons already given we held that the prosecution has proved a prima facie case against the respondent on the original charge. We therefore allowed the appeal by the prosecution. The decision of the learned trial judge in reducing the charge and in convicting and sentencing the respondent on the amended charged was set aside. The respondent's defence ought to be called on the original charge proffered against him. The case was therefore remitted back to the High Court for the accused's defence to be called on the original charge under s 39B(1)(a) of the Act by the learned trial judge.

Appeal allowed.

Reported by Kanesh Sundrum